ings were entrusted was severely limited, clearly for the reason that it was essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment. This philosophy may be gleaned from many of the decisions cited to us, and in particular from *Devan Nair,*[1] page 262.

Section 36 of the Act gives effect to this philosophy by providing that at the conclusion of the trial of an election petition the Election Judge must determine whether the candidate whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and must certify such determination to the authorities set therein; and that "upon such certificate being given such determination shall be final".

If such a determination cannot be appealed from because it is essential that such matters should be determined as quickly as possible, so that the Assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment, would it not be absurd if a successful candidate whose election is challenged is allowed to delay and protract the petition brought against him by obtaining one interlocutory order after another and then appealing against them all the way to the highest court of the land?

It is true that the advice of the Privy Council in *Devan Nair*[1] gives us some difficulty; but we prefer to hold that that decision is only authority for the facts therein which are peculiar to itself (the order appealed from there to strike out the petition was a final one, it was made in chambers on a summons, *and* yet leave to appeal was granted), which facts are quite different from the facts in these appeals.

In that case their Lordships did not seem happy that a final order was treated as an interlocutory order, for Lord Upjohn said at page 263:

"Whether he [the learned judge] was right so to treat his order is a matter which their Lordships do not decide; they think that it is a doubtful point and it would have been better if in terms he had dismissed the petition when no question [of appeal] could have arisen. They will assume that he was right in thinking that for the purposes of the appeal he was making an interlocutory order."

His Lordship then added significantly at page 264:

"Nevertheless, their Lordships would like it to be understood that they are reluctant to entertain interlocutory appeals especially in election petitions and unless the case raised is of exceptional public and general importance the Federal Court may well think it wiser to leave the party aggrieved to apply to their Lordships' Board for special leave to appeal under section 74(2) of the Courts of Judicature Act 1964."

The above observation is significant in that it shows their Lordships' view that the courts should not encourage appeals even from orders that do not finally dispose of the disputes.

It seems to us that Parliament should consider the ambiguity in the law disclosed in these appeals, decide as a matter of policy whether or not interlocutory orders made in an election petition should be appealable and legislate accordingly.

Order accordingly.

V. SUBRAMANIAM & ORS v. CRAIGIELEA ESTATE

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 14 & February 19, 1982]

[Kuala Lumpur — Federal Court Civil Appeal No. 61 of 1977]

Administrative Law — Certiorari — Award of Industrial Court — Error of Law — Industrial Court acting within jurisdiction — High Court has no jurisdiction to quash award — Industrial Relations Act, 1967, s. 29(3)(a).

Industrial Law — Strike — Termination of employment — Reference to Industrial Court — Reinstatement ordered — No error of jurisdiction — Certiorari cannot be issued to quash award — Probationer — Whether deemed to be confirmed at end of probation period — Industrial Relations Act, 1967, s. 29(3)(a).

In this case the appellants were employed on probation by the respondent estate. At the end of their probationary period they continued in service, but none had been confirmed. They joined in a strike organised by the Union to which they belonged. The respondent estate informed the appellants that as they had been absent from work without lawful or reasonable excuse for more than two consecutive days, the estate had terminated their employment. The matter was referred to the Minister who eventually referred the matter to the Industrial Court. The Industrial Court ordered reinstatement of the appellants as confirmed in their appointments. The respondent estate applied for an order of certiorari and the High Court made an order quashing the award. The appellants appealed to the Federal Court.

Held: (1) the Industrial Court had jurisdiction to consider and determine the issues formulated by them in this case and in doing so the Industrial Court did in no way exceed its jurisdiction. The High Court therefore had no jurisdiction to quash the award of the Industrial Court;

(2) the Industrial Court was in error in holding that a probationer who at the end of his probationary period has not been confirmed or told to go must be regarded as having been admitted into permanent service. This error of law did not go to jurisdiction and gave no power to the High Court to quash the award;

(3) the award was severable and the High Court could quash that part which was a mistake without touching the rest;

(4) the order of the Industrial Court should be restored save that the employees be reinstated only as trainees or on probation, as the case may be.

Cases referred to:-

(1) *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1980] 2 M.L.J. 165.

(2) *Anisminic* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.

(3) *Express Newspapers (P) Ltd.* v. *Labour Court* A.I.R. 1964 S.C. 806.

The following cases were also cited in argument: *South-East Asia Firebricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.* [1975] 2 M.L.J. 250; [1976] 2 M.L.J. 67; *National Union of Commercial Workers* v. *Lindteves-Jacoberg (M) Sdn. Bhd.* [1981] 1 M.L.J. 242; *Re Dunlop Estates Bhd.* [1981] 1 M.L.J. 249; *The Queen* v. *Clarkson & Anor,* (1975-76) 134 C.L.R. 56; *Jaipur Udyog Ltd.* v. *Cement Work Karmachari Sangh* [1972] 3 S.C.R. 296; (1972) 1 S.C. Cases 691; *Delhi Cloth & General Mills Co. Ltd.* v. *Workmen* [1969] 2 S.C.R. 307; *Calcutta Electric Supply Corporation Ltd.* v. *Calcutta Electric Supply Workers Union* A.I.R. 1959 S.C. 1191, 1193; *K.C. Mathews* v. *Kumpulan Guthrie Sdn. Bhd.* [1981] 2 M.L.J. 320; *Rookes* v. *Barnard* [1964] A.C. 1129, 1180-1181, 1204; *Morgan* v. *Fry* [1968] 2 Q.B. 710, 724, 726-728, 734, 736, 738; *Chappell* v. *Times Newspapers* [1975] 2 All E.R. 233; [1975] 1 W.L.R. 482; *Simmons* v. *Hoover Ltd.* [1977] 1 All E.R. 775, 776, 784; *United Engineering Workers Union* v. *Devanayagam* [1967] 2 All E.R. 367.

FEDERAL COURT.

D.P. Xavier for the appellant.

V.T. Nathan for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): This is an appeal from a decision of Harun J. quashing an award of the Industrial Court ordering the reinstatement of four employees who had been dismissed by their employer Craigielea Estate, Bukit Pasir, Muar.

There was a strike by the union to which the employees belonged and they joined in the strike.

On April 9, 1974, the employer informed the four employees in writing that as they had been absent from work without lawful or reasonable excuse for more than two consecutive days from April 1, 1974, the estate had terminated their employment.

The employees maintained that they had been wrongfully dismissed. The matter was referred to the Minister, but there was no settlement. So the Minister referred the matter to the Industrial Court under section 7(2) of the Industrial Relations Act, 1967 ("the Act") by letter dated August 6. That letter reads:

"I am to inform you that the Ministry has received a complaint [from the four employees] about their dismissal by the [estate].

Because the efforts of the Ministry to settle the dispute have failed, the Minister refers it to the Industrial Court under section 7(2) (of the Act) for determination."

The reference was heard by the Industrial Court on February 24 to 27, 1975 and on March 31 the court handed down their award ordering reinstatement of the four employees.

The estate was on December 8, 1973, granted leave to move the High Court for an order of *certiorari* to remove to it for the purpose of its being quashed the Industrial Court's award.

The estate argued — as can be seen from the affidavit in support sworn by Mr. Davidson, the estate's planting adviser — that the Industrial Court had made various errors in law and exceeded its jurisdiction.

The application to quash was eventually heard by Harun J. on February 17, 1975, who on the same day granted the order and quashed the award, despite section 29(3)(a) of the Act.

The employees have appealed to us arguing that the Industrial Court in making its award was acting within its jurisdiction and had not exceeded it and therefore the High Court had no jurisdiction to quash the Industrial Court's award.

Mr. Nathan for the employer on the other hand argued that the Industrial Court had committed errors in law and or had exceeded its jurisdiction so that the High Court had power to quash its award and did right to do so.

The issue here is whether or not the High Court had jurisdiction to quash the Industrial Court's award.

The answer to this question turns on the construction of section 29(3)(a) of the Act which at the material time read:

"Subject to this Act, an award of the Industrial Court shall be final and conclusive, and no award shall be challenged, appealed from, reviewed, quashed or called in question in any court."

At one time there were conflicting High Court decisions on the meaning of this section. But any doubt on the meaning has since been resolved by the Privy Council in *South East Asia Fire Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union & Ors.*,[1] a decision delivered only on June 24, 1980, after the decision appealed from herein.

In *Fire Bricks* their Lordships held:

(1) that section 29(3)(a) prohibited the High Court from quashing an award of the Industrial Court by *certiorari* proceedings, if it acted within its jurisdiction and merely made an error of law on the face of the record which did not affect its jurisdiction;

(2) but the section did not prohibit the High Court from quashing such an award

(i) if the Industrial Court acted without jurisdiction; or

(ii) if it exceeded its jurisdiction.

Where a tribunal is entitled to enter on the enquiry in question, i.e. it has jurisdiction to entertain the enquiry, nevertheless its decision may be a nullity so that it may be quashed by an order of *certiorari*, because it has done or failed to do something in the inquiry which is of such a nature that its decision is a nullity. Lord Reid in *Anisminic* v. *Foreign Compensation Commission*[2] gave examples at page 171. He said:

"... there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide rightly."

At page 195 Lord Pearce gave examples of lack of jurisdiction. He said:

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity."

To consider the question whether or not the Industrial Court had jurisdiction or had exceeded it, we must consider the issues before it, and to do this it is necessary to look at the written case for the em-

ployees (at page 75 of the appeal record) and the estate's written reply (at page 80) submitted to the Industrial Court.

The employees stated that the estate had summarily dismissed them in writing with effect from April 9, 1974; that the alleged grounds for the dismissal were that the employees had absented themselves for more than two consecutive days from April 1; that in fact the employees were participating in a legal strike from April 1 to 9 called by the All Malayan Estates Staff Union; that as members of the Union they struck in furtherance of a trade dispute; that they were then exercising their legitimate rights as members thereof; that their absence from work was with reasonable excuse under the Employment Ordinance, 1955; and that therefore their dismissal was victimization and unfair labour practice and illegal and unjustified.

In their written reply to the Industrial Court the estate said that the first employee was a trainee executive from September 1, 1971, the second a trainee conductor on three months' probation from December 17, 1973, the third a temporary trainee conductor for three months from December 14, 1973, and the fourth a trainee conductor for three months from December 1, 1973; that the contracts of the second, third and fourth employees had expired at the end of their respective three-month period as none had been confirmed; that the termination of their contracts of service was possible only on April 9, 1974, owing to a change of management; and that as they absented themselves without just cause or reason from April 1 until 9 and thereby breached the terms of their appointments, they thus terminated their contracts of employment.

From the statement of their case by the employees and from the estate's reply, it is clear that the main issue was whether or not they had been wrongfully dismissed, as they claimed and which the estate denied.

To determine this main issue it was necessary for the Industrial Court to decide, as they did, three subsidiary issues: first, whether the employees who were all on probation but had not been confirmed or had their employment terminated at the end of their probationary period continued to be trainees at the time of their dismissal; secondly, whether the first employee Subramaniam engaged as a trainee executive was still such at the time of his dismissal; and thirdly, whether or not the employees could have become members of the Union so as to entitle them to join in a strike.

With respect to Mr. Nathan for the estate, these subsidiary issues *did* arise from the main issue. The Industrial Court had jurisdiction to decide them. Having studied the award and Mr. Nathan's criticism of it, we do not think that in determining the main and subsidiary issues resulting in an order that the estate reinstate the four employees the Industrial Court had given its decision in bad faith, had made a decision which it had no power to make or had failed in the course of its inquiry to comply with the requirements of natural justice. We do not think that it misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which had not been remitted to it. In our judgment it had not refused to take into account something which it was required to take into account nor had it based its decision on some matter which under the Act it had no right to take into account.

There was no suggestion that there was any absence of those formalities or things which are conditions precedent to the Industrial Court having jurisdiction to embark on the inquiry.

So in our judgment the Industrial Court had jurisdiction to consider and determine the issues that they formulated and in doing so did in no way exceed it.

It follows that in our judgment the High Court had no jurisdiction to quash its award.

On the first subsidiary issue the Industrial Court was of the opinion that a probationer who at the end of his probationary period has not been confirmed or told to go must be regarded as having been admitted into permanent service, following its own earlier decision in Award 4 of 1970 (presided over by the late Mr. MacIntyre). In our judgment this was erroneous, for as was stated by the Indian Supreme Court at page 807 in *Express Newspapers (P) Ltd.* v. *Labour Court*[3]:

> "There can, in our opinion, be no doubt about the position in law that an employee appointed on probation for six months continues as a probationer even after the period of six months if at the end of the period his services had neither been terminated or confirmed."

But in our judgment this error of law did not go to jurisdiction and gave no power to the High Court to quash the award. *Fire Bricks* has put to rest completely the idea that mere error of law on the face of the record entitles the High Court to quash an award of the Industrial Court provided that it had jurisdiction and did not exceed it when making its award.

However in ordering the reinstatement of the four employees, the Industrial Court did not order that they be reinstated in their former position as trainees or on probation as the case may be but as having been confirmed in their appointments.

Mr. Nathan argued that in so doing the Industrial Court had exceeded its jurisdiction. With respect we agree with Mr. Xavier that if this was a mistake, the award was severable and the High Court could quash that part which was a mistake without touching the rest. Accordingly we order that this appeal be allowed and that the order of the Industrial Court be restored save that the employees be reinstated only as trainees or on probation, as the case may be.

The estate to pay costs here and below.

Order accordingly.

Solicitors: *D.P. Xavier & Co.; Shearn Delamore & Co.*